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SUPREME COURT - STATE OF NEW YORK  
CRIMINAL TERM TAP C QUEENS COUNTY  
125-01 Queens Boulevard, Kew Gardens, New York

P R E S E N T:

HON. ROBERT J. HANOPHY  
Justice Supreme Court

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THE PEOPLE OF THE STATE OF NEW YORK

-against-  
EDWIN SMITH,

Defendant.

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: Ind. No. 42/96  
:  
: Motion to Vacate Judgment  
: of Conviction  
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The following papers numbered  
1 to 4 submitted in this motion

Robert L. Kuby, Esq.  
For the motion

Jack Warsawsky, A.D.A.  
Donna Aldea, A.D.A.  
Opposed

Notice of Motion and Affidavits Annexed

Papers Numbered  
1-2

Answering and Reply Affidavits

Exhibits

Grand Jury Minutes

3

Affirmation in Opposition

4

Upon the foregoing papers and in the opinion of the Court herein, the defendant's motion to vacate the judgment of conviction is granted for the reasons stated in the accompanying memorandum of this date.

GRANTED:

Date: October 11, 2000

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Robert J. Hanophy, J.S.C.

MEMORANDUM

SUPREME COURT, QUEENS COUNTY  
CRIMINAL TERM, TAP C

THE PEOPLE OF THE STATE OF NEW YORK

-against-

EDWIN SMITH,

Defendant.

: By: Robert J. Hanophy, J.S.C.  
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: Dated: October 11, 2000  
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: Ind. No. 42/96  
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The defendant, Edwin Smith was convicted of Murder in the Second Degree, Arson in the Fourth Degree and Criminal Trespass, following a jury trial. He was sentenced to a term of seventeen years to life on the murder count, two to four years on the arson conviction, and ninety days for criminal trespass, all sentences to run concurrently with each other. (Hanophy, J. at trial and sentence).

The charges in this case arose from an incident which occurred on the evening of December 31, 1995 when the defendant, who was homeless at the time, lived inside of a vacant building along with his girlfriend and two other homeless men. The defendant, while living in the vacant building lit a makeshift candle inside of his room, which he lit for light and for warmth. As the defendant slept, a quilt that he kept hanging on the wall near the flame of the candle caught fire. The defendant attempted to put out the fire but was unsuccessful. He then woke the other occupants and they were able to flee the building to safety. Firemen soon responded to the fire and entered the building to search for people. In the course of fighting the fire, Lieutenant John Clancy was killed.

The defendant appealed his judgment of conviction to the Appellate Division, Second

Department. On January 8, 1999, his conviction was affirmed by the appellate court. The defendant did not seek leave to appeal to the Court of Appeals.

The defendant has now moved to vacate his judgment of conviction pursuant to C.P.L. Section 440.10 claiming that his trial counsel was ineffective. More specifically, the defendant claims that he was denied his right to effective assistance of counsel because his attorney allegedly failed to convey and failed to discuss the People's plea offers with him and he claims counsel was ineffective because counsel allegedly failed to properly explain the law of felony murder to the defendant.

Based upon the motion and the response submitted this Court granted a hearing.(See, Order dated April 25,2000). At the hearing the defense called the defendant, Edwin Smith and his trial attorney, Mr. Michael Mays. Also received in evidence at the hearing were the minutes of Court proceedings from August 6 and 7, 1996, as well as the minutes from October 3, 1996. The Court finds the testimony of both of these witnesses to be credible and accordingly makes the following Findings of Fact and Conclusions of Law.

#### FINDINGS OF FACT

The defendant, Edwin Smith, testified that upon his arrest he was provided the services of Legal Aid attorney, Ms. Barbara Byrne. While the defendant was incarcerated on these charges, he received a counsel visit at Rikers Island. When the defendant went to the room for a counsel visit, he expected to see his attorney, Ms. Barbara Byrne. Instead, he saw Mr. Michael Mays and his wife, Ms. Tami Mays. They told the defendant their names and that they were there to see him. They told the defendant that they wanted to represent him on these charges. They told the defendant that they were from the neighborhood where the fire occurred and that they knew the

area. The defendant told them he had a lawyer from Legal Aid and that he couldn't afford a private lawyer. Mr. Mays told the defendant that they would handle the case for free.

At that time the defendant was very happy with his representation from Ms. Byrne, so he asked Mays if he and Ms. Byrne could work together. Mays said that that was not possible and that he thought it would be best for the defendant to have a private lawyer for this case. The defendant said "okay" and Mays said that he was going to file a notice of appearance.<sup>1</sup>

On the next court date the defendant informed Ms. Byrne about what was going on. From then on, the defendant would see Michael Mays in court when the case was on the calendar and not Byrne. Mays would constantly pound into the defendant's head that it's better to have a private lawyer.

The defendant testified at the hearing that from the time Mays became his attorney until August 6, 1996, Mr. Mays did not have any conversations whatsoever with the defendant about pleading guilty. The defendant said on August 5, 1996, he was in court before Judge Hanophy where they were conducting pre-trial hearings to determine the admissibility of the statements allegedly made by the defendant. The defendant recalled that at these hearings, Judge Hanophy asked the defendant in open court if he would take eight years and that the defendant rejected that offer. The defendant said between the time Judge Hanophy asked the defendant that question and the time he made the decision not to take the plea, his attorney, Mr. Mays did not

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<sup>1</sup>*While the defendant does not contend that Mays' conduct in this respect denied him of his right to effective assistance of counsel, the Court notes that this conduct was in violation of 22N.Y.C.R.R. §1200.35[DR7-104] which states that an attorney shall not communicate on the subject of representation with a party that lawyer knows is represented by another lawyer, unless the lawyer has the prior consent of the lawyer already representing the client.*

give the defendant any advice on whether or not the defendant should take a plea.

The defendant testified that after the decision on the suppression hearing was rendered, Judge Hanophy again raised the issue of a plea. The defendant said the Judge asked the defendant whether he was looking for six years, but the defendant said he just rejected the plea. The defendant testified that Mr. Mays never offered him any advice as to whether or not to take the plea. The defendant said the Judge told him and Mr. Mays that he knew a man that didn't take the plea and went to trial and Mays answer to the Court, without discussing the plea with the defendant, was that Mays knew of a similar case where the guy was acquitted. The defendant said Mays never discussed any such case with him.

When asked about what advice or counseling his attorney gave him regarding the likelihood of conviction after trial, the defendant said that Mr. Mays always advised him that this could be beat at trial and that is where it should go.

The defendant testified that about a week before the trial began, Judge Hanophy, again in open Court offered the defendant a plea of six to twelve years, which the defendant also rejected at that time. Again, the defendant testified Mays offered no advice whatsoever to the defendant about whether or not to accept or reject this offer.

While the trial was taking place the jury was out deliberating and sending notes to clarify the definition of careless and reckless. During this time, Judge Hanophy in open court offered the defendant seven and a half to fifteen years which the defendant also rejected. Again, the defendant testified that Michael Mays never counseled the defendant about whether or not to take this plea. The defendant further testified that throughout the pendency of the entire case, Mays never discussed any of the pros and cons of pleading guilty with the defendant.

The defendant said Mays never fully explained or made him understand the reckless arson charge and that the defendant didn't realize that if the jury found him guilty of the underlying arson charge, he would also lose on the felony murder charge. The defendant only learned this from his appeals lawyer. He said he never would have went to trial if he understood that if he was convicted of the underlying arson he would also be convicted of the murder.

On cross-examination the defendant said it was his free choice to have Mays represent him, but he only did so because he thought private attorneys got better deals. The defendant said he pleaded guilty on some of his other cases because he got deals on them. He said the only time that he was made a plea offer in this case was when he was brought to Court and told by the Judge. He said he didn't take a plea in this case because he thought he was not guilty. This was based, in part, upon what Mays was telling him. The defendant testified that Mr. Mays did tell the defendant what the offer was, but he never explained any of the ramifications of accepting or rejecting the plea.

Michael Mays was called as a witness by the defendant. He testified that he was trial counsel for the defendant, Edwin Smith. He said during the course of his representation of the defendant he conveyed plea offers to the defendant. Mays said he only discussed the offers with the defendant to the extent that he would inform the defendant of his exposure in terms of what he could get if he was not successful at trial versus what offer was made. He said that he and the defendant discussed all of the charges in the indictment, as well, and what each of the charges of the indictment meant from a legal standpoint.

Mr. Mays testified that an offer was made of 5 - 10 or 5 - 15 years and he recalled saying to the Judge that he had spoken to the defendant and that the defendant did not want to take the

plea. Mr. Mays further stated that during his meetings with the defendant in the pens and at defense table, he did not give an opinion as to what the defendant should do. Mays told the defendant that it was the defendant's own decision. Mays testified he never gave the defendant an opinion about whether or not to plead guilty.

At the hearing, the official court transcripts for August 6 and 7, 1996 and October 5, 1996 were introduced by the People and were received in evidence at the hearing. The pertinent parts of the transcripts are as follows:

**THE COURT:** The motion to suppress the statement is denied. A written decision to follow.

This case is very similar to what I had about five years ago. I had a gentleman employed by the Transit Authority, about 62 years old. I tried to get this man a manslaughter, and it went one and on. The further it went on, the more I pleaded with the man to take the plea. He didn't. His attorney wanted him to take a plea. He was a nice man. The District Attorney wanted him to take the plea. He went to trial. He was convicted in about 12 minutes, of intentional homicide.

The reason I mention this, the tape is pretty damning, as far as I could see. If he is convicted again of an E felony and that leads to a felony conviction for homicide, he gets life in prison. A felony conviction, he gets life. There is no option on the Court's part.

Are you sure you are not looking for six years on this?

**MR. MAYS:** I think when we had spoken yesterday, I think we were talking about eight years, when we approached. There is an offer, I will convey it to my client.

**THE COURT:** It seems to me your client wanted nothing yesterday. I am telling you, if you lose and you are convicted of felony murder, you go away for life.

**What are you, 32?**

**THE DEFENDANT: Thirty-six.**

**THE COURT: Thirty-six. That is a long time.**

**You won't discuss this case? I am telling you, this case comes out felony murder, the headline in the New York News, client turns down six years.**

**MR. MAYS: It could also be the other way, your Honor.**

**THE COURT: Sure. He beats it.**

**MR. MAYS: Client acquitted for maybe a case he shouldn't have been charged for.**

**THE COURT: All right. I am not going to browbeat you.**

**MR. MAYS: I don't want you to.**

**THE COURT: I have an eerie feeling about this case, and it goes back to one case. There it turned out the guy got an intentional murder. I begged him to take the plea. But I can't make you take the plea.**

**MR. MAYS: I remember a more recent case in New York County where a gentleman was acquitted, from my understanding, under a similar set of facts and circumstances.**

**THE COURT: This case is ready for trial.**

**Then on October 3, 1996, the following colloquy occurred.**

**MR. MAYS: Your Honor, I have spoken with my client. I have indicated the Prosecution has made a final offer. My client declines that offer.**

#### **CONCLUSIONS OF LAW**

**The defendant, Edwin Smith stands convicted of Murder in the Second Degree (Penal Law**

§125.25 (3), Arson in the Fourth Degree(Penal Law §150.05), and Trespass(Penal Law §140.10). He has now moved pursuant to C.P.L. §440.10 to vacate his judgment of conviction on the grounds that trial counsel's representation was ineffective. He claims that his attorney was ineffective because he failed to advise and counsel the defendant fully about the advantages and disadvantages of accepting the various plea offers that were made to him and because counsel failed to properly explain the law of felony murder to the defendant.

The right to the assistance of counsel for an accused is a right guaranteed under both the Federal and State Constitutions. See, U.S. Const. 6<sup>th</sup> Amend; N.Y. Const. Art I §6. An accused's right to counsel is an essential ingredient of our criminal justice system grounded within our nation's concept of a fair trial . See, People v. Benevento, 91 N.Y.2d 708 (1998), citing People v. Felder, 41 N.Y.2d 287. The constitutional right to counsel has been interpreted to include the right to the "effective" assistant of counsel which generally means the right to the "reasonably competent services of an attorney devoted to the client's best interests". See, People v. Benevento, supra at 711, citing People v. Claudio, 83 N.Y.2d 76.

The term "effective assistance of counsel" is not subject to a precise formula applicable in all cases. See, People v. Baldi, 54 N.Y.2d 137. What constitutes effective assistance varies depending upon the circumstances of each case. The law requires each claim of ineffective assistance of counsel to be reviewed according to the law, the evidence, presented, and the circumstances of a particular case which must be viewed in its totality as of the time of the representation to determine whether a defendant received "meaningful representation." See, People v. Benevento, supra; People v. Baldi, supra.

While the inquiry into whether a defendant received effective assistance of counsel

generally focuses on the quality of the representation provided to the accused, a claim of ineffectiveness ultimately hinges upon the fairness of the process as a whole. Stated another way, a Court must examine whether counsel's acts or omissions prejudiced the defendant's right to a fair trial. See, People v. Hobot, 84 N.Y.2d 1021; People v. Bennett, 29 N.Y.2d 462; People v. Aiken, 45 N.Y.2d 394. Therefore, as long as the defense reflects a reasonable and legitimate strategy under the circumstances and evidence presented, even if it is unsuccessful, counsel's representation will not rise to the level of ineffective assistance of counsel if the course chosen by the attorney displays an apparently legitimate and reasonable defense strategy. People v. Rivera, 71 N.Y.2d 705 (1988).

Thus, courts have been leery to set aside convictions based upon claims of ineffective assistance of counsel where there appears to be a legitimate or strategic explanation for counsel's acts or omissions. See, People v. Benevento, 91 N.Y.2d 708 (counsel's ultimate decision not to call the defendant himself to the stand even though he made a contrary representation in his opening statement does not constitute an objectively incompetent performance); People v. Rivera, supra, (failure of counsel to request a suppression hearing does not amount to ineffective assistance of counsel). Therefore, "it is incumbent upon the defendant to demonstrate the absence of strategic or other legitimate explanations" for counsel's alleged shortcomings to establish a claim of ineffective assistance of counsel. See, People v. Rivera, supra.

While New York State Court's have addressed the standards to be applied in cases where it is claimed that counsel was ineffective, New York State Court's have not specifically addressed the issue of whether counsel's failure to advise a client of the advisability of accepting or rejecting an offered plea constitutes ineffective assistance of counsel. However, the United States Court of

Appeals for the Second Circuit has ruled on how this question must be resolved. See, Boria v. Keane, 99 F. 3d 492(2d. Cir. Ct. App.,1996).

In Boria the defendant was convicted of criminal sale of a controlled substance following a jury trial and he was sentenced to a term of imprisonment of twenty years to life. Represented by a new attorney, the defendant moved to vacate his judgment of conviction on the grounds that his trial counsel failed to properly advise the defendant as to how to deal with the offered pleas before trial. A hearing was granted on this claim at which time the defendant's trial attorney testified that he had advised the defendant of the consequences of rejecting the offered plea but he had not discussed with the defendant the advisability of accepting or rejecting the offered plea because he was certain that the defendant would never admit his guilt or accept a plea.

After the hearing, the trial judge in Boria rejected the defendant's claim that counsel was ineffective for failing to advise the defendant whether or not to accept the offered plea and the Appellate Division affirmed the trial court's denial of this claim. Leave to appeal to the Court of Appeals was denied and the defendant then renewed his claim in Federal District Court by way of Habeas Corpus. The United States District Court also rejected the defendant's claim and the matter was appealed to the United States Court of Appeals in the Second Circuit.

On appeal, the Second Circuit Court of Appeals granted the defendant's petition holding that counsel for the defendant was constitutionally required to discuss with the defendant the advisability of accepting an offered plea bargain and that his failure to do so violated the defendant's constitutional right to counsel. See, Boria v. Keane, supra, at 496-497. The Court of Appeals reasoned that the presumption that counsel's conduct falls within the wide range of effective representation, as well as the presumption that operates to protect attorney's from

having their strategic decisions judged in hindsight, does not apply to cases where counsel fails to give advice to a client regarding whether or not to accept an offered plea. Boria v. Keane, supra.

The Boria Court reasoned that the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance which is generally applied to claims of ineffective assistance of counsel cannot be applied to cases where counsel fails to give advice to a defendant regarding whether to accept an offered plea because counsel is not presented with a strategic decision as to whether or not to give such advice. The Court further stated that counsel has a duty to fully advise his client on particular plea offers, and his failure to do so cannot be said be motivated by a legitimate or defense strategy. (The Court referred to the American Bar Association Model Code of Professional Responsibilities, Ethical Consideration 7-7 which states as follows, "A defense lawyer in a criminal case has the *duty to advise his client fully on whether a particular plea to a charge appears to be desirable.*") (emphasis supplied) Therefore, the Federal Appeals Court in our jurisdiction has concluded that where counsel fails to give his client advice on whether or not to accept an offered plea, since counsel is not presented with a strategic decision as to whether or not to give such advice because he has a duty to do so, the client is deprived of his right to effective assistance of counsel.

The People argue that this Court is not bound by the decision in Boria. This Court disagrees. It is axiomatic that under our law, while State Courts are free to afford broader protections or rights under the State Constitution, they cannot afford less rights. People v. Robinson, 271 A.D.2d 17 (1st Dept. 2000). Stated in another way, the equal protection clause of the State Constitution provides at least as broad of a protection of a right as the Federal counterpart. Since, the Court in Boria decided this issue based upon a fundamental right the

**Court finds that it is bound by the holding in Boria.**

**Therefore, whereas in this case it is clear from the record that the defendant's attorney clearly failed to render any meaningful advice to the defendant about whether or not to accept the plea counsel's representation is ineffective. As the testimony revealed at the hearing, Mays at best merely conveyed the offers made to the defendant when all the parties were in open court and that Mays never counseled the defendant on the advisability of accepting or rejecting the offered pleas. Here, as in Boria, counsel's failure to render any advice to the defendant cannot be deemed to be a reasonable or a legitimate strategy, nor can it be legitimately explained. Here, counsel's failure to discuss with the defendant the advisability of accepting or rejecting the plea bargain, particularly when accepting the offer was clearly in the defendant's best interest, deprived the defendant of his constitutionally required advice of counsel in violation of the defendant's State and Federal constitutional right to effective assistance of counsel. Boria v. Keene, 997 3d 492. Furthermore, the Court finds that the defendant has demonstrated the absence of strategic or other legitimate explanation for counsel's shortcoming. People v. Rivera, *supra*.**

**The People seeks to minimize or even excuse counsel's failure to advise the defendant about whether to accept or reject the offered plea by arguing that this Court, in its colloquy with the defendant, apprised the defendant of the offered plea and rendered necessary advice to the defendant about whether or not to accept it. Contrary to the People's argument, the law does not require the Court to conduct a defense since the standard of justice requires that a defendant who chooses counsel be represented by his own counsel. See, People v. LaBree, 34 N.Y.2d 257 (1974). In other words, the Court's attempts to cure the deficiencies of counsel cannot be deemed to satisfy the constitutional requirement of the assistance of counsel, People v. LaBree, *supra*.**

Furthermore, any reliance by the People upon People v. Lew, 254 A.D. 2d 434 (2d Dept. 1988) is misplaced. In that case the Court found that the record clearly showed that both the Court *and defense counsel* amply advised the defendant of the plea offer and the possible consequences of a conviction after trial. See, People v. Lew, supra at 435. (Emphasis supplied) Here, there is no evidence in the record that counsel for the defendant ever discussed the advisability of accepting or rejecting any plea. In fact, Mays testified that he never advised the defendant or rendered his opinion as to whether or not the defendant should take the plea.

Therefore, this Court finds that while the general inquiry into whether or not a defendant has received ineffective or meaningful representation in a case focuses upon the quality of the representation, without regard to the outcome, a claim that counsel was ineffective for failing to advise a defendant about whether to accept or reject a plea is subject to a different analysis. The presumption that counsel's conduct falls within the wide range of reasonable professional assistance which is generally applied to claims of ineffective assistance of counsel, does not apply to cases where counsel fails to give advice to a defendant regarding whether to accept an offered plea because counsel is not presented with a strategic decision as to whether to give such advice. Counsel had a duty to do so. See, People v. Keane, supra; People v. Rivera, supra; People v. LaBree, supra

Therefore, in this case counsel's mere conveyance of an offer and his complete failure to meaningfully discuss with the defendant the advisability of accepting or rejecting any plea offer in this case deprived the defendant of his constitutionally required advice in violation of the defendant's right to effective assistance of counsel.

Accordingly, the defendant's motion to set aside the judgment of conviction on the grounds

**of ineffective assistance of counsel is granted. The judgment of conviction is vacated and the indictment is reinstated.**

**Order entered accordingly.**

**DATED: October 11, 2000**

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**Robert J. Hanophy, J.S.C.**